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SUPREME COURT  
OF THE STATE OF WASHINGTON

Skagit County Case No. 15-2-00334-1

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UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN and RAY LUNDREN, wife and husband,

Respondents.

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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

Respondents Sharline and Ray Lundgren commenced this quiet title action to protect their property rights in a strip of land that has been exclusively maintained and possessed by the Lundgrens and their extended family since 1947. The Lundgrens acquired title by adverse possession decades before the Appellant Upper Skagit Indian Tribe (“The Tribe”) acquired record title in 2013. The Tribe provided no evidence of anyone besides the Lundgrens and their extended family possessing or maintaining the property in dispute. On the other hand, the Lundgrens’ evidence shows that the Lundgren family has possessed and maintained the disputed property for over six decades.

In an attempt to get around this clear-cut case of adverse possession, the Tribe relies on a variety of arguments based on sovereign immunity. In short, sovereign immunity does not bar this quiet title action because the Lundgrens’ adversely possessed the disputed property while it was still owned by private individuals (before the Tribe purchased record title). The Tribe never acquired title to the disputed property because the seller had lost title via the doctrine of adverse possession and had nothing to convey. The Tribe’s status as a sovereign does not otherwise impact this case. Washington law has long recognized that trial courts possess *in rem* jurisdiction to determine property rights in real property located in Washington state, irrespective of whether the court has jurisdiction over the defendants. Were it otherwise, a tribe could obtain defective title to

real property from someone without title to give and achieve its goal simply by claiming immunity from suit. The trial court's decisions to deny the Tribe's Motion to Dismiss and grant the Lundgrens' Motion for Summary Judgment should be affirmed.

## II. STATEMENT OF THE CASE

The Lundgrens and the Tribe own title to adjacent parcels near Bow, Washington. (CP 28–29.) Sharline and Ray Lundgren obtained their parcel by deed in 1981, and they have occupied it continuously since that time. (CP 29.) The Lundgren family as a whole has owned the parcel continuously since 1947. (*Id.*) Immediately to the north is the Tribe's parcel. (*Id.*) The Tribe acquired title in 2013 from the heirs of Annabell Brown, who received the property from Annabell Brown's estate four months prior to the sale to the Tribe. (*Id.*) Annabell Brown had not occupied the property for many decades prior to her death, and her heirs had likewise not occupied it in the four months they owned it prior to the sale to the Tribe. (*Id.*)

Separating the two parcels is a barbed wire fence. (CP 28–29, 36.) Photos show that the fence is well-maintained and standing. (CP 40–42.) It is attached to a few cedar trees along its 1,306 feet length, and the photos show substantial tree growth over the wire that occurred over many decades. (*Id.*) The Lundgrens presented evidence that this fence represents the common boundary line between the two parcels, that it has been exclusively maintained by the Lundgren family since 1947, and that the

Lundgren family exclusively used the property to the south of the fence. (CP 28–30, 45–46, 60–61, 110–11.) The Tribe presented no evidence of anyone besides the Lundgrens possessing, maintaining, or even using either the fence or the property to its south.

After the Tribe purchased its parcel of land and before it commenced clear-cut logging operations,<sup>1</sup> the Tribe commissioned a survey that revealed the barbed wire fence was 19 feet north of the common property line on the east, and 25 feet north of the common property line on the west end. (CP 36.) Because the Tribe had not commissioned a survey before acquiring title, and the person in charge of due diligence for the Tribe had not visited the parcel’s southern boundary, the Tribe was unaware of the fence prior to the survey. (CP 114–115.) Following the survey, the Tribe approached the Lundgrens and asserted their right to occupy the strip of land south of the fence while beginning steps to dismantle the decades-old fence. (CP 30, 44.) The Lundgrens objected, and, in order to protect their property rights in the land, instituted this *in rem* quiet title action on March 4, 2015 in Skagit County Superior Court. (CP 7–27.)

On March 26, 2015, the Lundgrens moved for summary judgment on their *in rem* claims of adverse possession and mutual recognition and acquiescence. (CP 191–216.) The Lundgrens’ motion explained that

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<sup>1</sup> The Tribe has since logged their entire parcel up to the barbed wire fence.

neither sovereign immunity nor Civil Rule 19 barred their claims. (CP 199–202.)

On April 10, 2015, seeking to preempt the Lundgrens’ motion for summary judgment, the Tribe filed a motion to dismiss requesting dismissal on grounds of sovereign immunity and Civil Rule 19. (CP 229–44.) The Tribe also moved the court for a stay in the event it denied their motion to dismiss. (*Id.*) On April 24, 2015, the trial court denied the Tribe’s motion and refused to stay the proceedings. (CP 155–57.) A quick perusal of the Verbatim Report of Proceedings, attached as Appendix B to the Tribe’s Statement of Grounds, reveals numerous pages detailing the trial court’s discussion of the application of *Smale* and other Washington authorities uniformly supporting the court’s exercise of *in rem* jurisdiction over the dispute where adverse possession title existed prior to an Indian tribe’s acquisition. (RP 9–10, 23–24, 26–28, 30–33.)

The court also offered to make findings concerning a certification for emergency review as allowed by RAP 2.3(b)(4):

So I will deny the motion to dismiss. I will find that in my opinion, that motion is not dispositive of the case, but if there are any findings I can make, Mr. Hawkins, that you would like to seek emergency review for the sake of judicial economy and energy and effort and expense of the parties, to have this decision reviewed prior to further litigation at this level, I’m not opposed to that happening, but I don’t think that becomes automatic in my ruling.

(RP 32:23–33:33.) Counsel for the Tribe did not take up the judge’s invitation to seek a certification for immediate review, presumably to

avoid involvement by Division I of the Court of Appeals, which issued the *Smale v. Noretap* decision in 2009 that was directly controlling precedent and supported *in rem* jurisdiction in an adverse possession case such as this regardless of sovereign immunity.<sup>2</sup>

On April 30, 2015, and May 1, 2015, respectively, the Tribe filed a Notice of Discretionary Review to the Supreme Court and an Emergency Motion to Stay Trial Court Proceedings in order to prevent the pending motion for summary judgment from being heard. On May 6, 2015, the Supreme Court commissioner denied the Tribe's Emergency Motion to Stay.

On May 7, 2015, the trial court granted the Lundgrens' Motion for Summary Judgment, after which the Tribe converted their Notice of Discretionary Review into a Notice of Appeal. (CP 158–60, 141–48.)

### III. ISSUES PRESENTED

1. Did the trial court properly grant summary judgment on the Lundgrens' claims of adverse possession and mutual recognition and acquiescence when the undisputed facts showed that all elements of the claims were satisfied regardless of whether any prescriptive easement presumption of permissive use applied?

2. Did the trial court properly deny the Tribe's Motion to Dismiss based on sovereign immunity where adverse possession occurred long before record title was conveyed to the Tribe, and Washington law

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<sup>2</sup> See *Smale v. Noretap and Stillaguamish Tribe*, 150 Wn. App. 476, 208 P.3d 1180 (2009).

has long recognized the superior court's power to exercise *in rem* jurisdiction over land in Washington?

#### IV. LEGAL ARGUMENT

The Lundgrens' claims of adverse possession and mutual recognition and acquiescence are almost entirely unrebutted. For over six decades the Lundgrens and their extended family have possessed and maintained both the disputed property and the fence along its northern boundary. (CP 28–29, 45–46, 60–61, 110–11.) There is no evidence that anyone besides the Lundgren family used the disputed property in the last six decades, and there is no evidence that anyone besides the Lundgren family maintained the fence over the last six decades. In the words of the trial court judge, “this is as clear as a case as I’ve had on the bench . . .” (RP (May 7, 2015) 20:18–20.)

The central issue on appeal is whether the Lundgrens' claims should be dismissed because a sovereign Indian Tribe acquired record title to the disputed property. Whether the Tribe is a sovereign is not in dispute. The Lundgrens admit that the Tribe is entitled to sovereign immunity. Nonetheless, Washington law has consistently recognized that sovereign immunity does not bar a quiet title action where the claimant adversely possessed the disputed property *before* the sovereign acquired record title (when the property belonged to a private individual). *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012); *Smale v. Noretap and Stillaguamish Tribe*, 150 Wn. App. 476, 208 P.3d 1180 (2009) Here, the

Lundgrens satisfied the requirements of adverse possession while the disputed property was owned by Annabelle Brown and her heirs, so the Lundgrens were automatically vested with title before the Tribe acquired record title. In other words, the Tribe never acquired actual title. Moreover, Washington law holds that trial courts have jurisdiction *in rem* to adjudicate property rights over land in Washington. Thus, the Tribe's status as a sovereign had no impact on the trial court's ability to decide this case. The trial court's orders denying the Tribe's Motion to Dismiss and granting the Lundgrens' Motion for Summary Judgment should be affirmed.

**A. Summary Judgment was appropriate because the Lundgrens satisfied each and every element of adverse possession.**

Review of a trial court's decision on summary judgment is *de novo*. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). The appellate court engages in the same inquiry as the trial court. The facts and all reasonable inferences therefrom are considered in the light most favorable to the nonmoving party. *Id.* The nonmoving party may not rely on mere speculation or argumentative assertions that unresolved factual issues remain. *Heath v. Uruga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001). Once the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. *Id.* A material fact is one on which the outcome of the litigation depends. *Capitol Hill Methodist*

*Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 363, 324 P.2d 1113 (1958).

An appellate court will affirm an order granting summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

Adverse possession is a question of law when the facts of the case are not in dispute. *Shelton v. Strickland*, 106 Wn. App. 45, 50, 21 P.3d 1179 (2001) (quoting *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 758, 774 P.2d 6 (1989)). In *ITT Rayonier*, the Washington Supreme Court set forth the necessary basic minimum elements in a claim for adverse possession. Possession must be “(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.” 112 Wn.2d at 757. “Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years.” *Id.* (citing RCW 4.16.020). The court continued by stating that “as the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element.” *Id.* (internal citations omitted). A conveyance by operation of law occurs and vests the adverse claimant with ownership automatically once the statute of limitations has elapsed. *Halverson v. Bellevue*, 41 Wn. App. 457, 460, 704 P.2d 1232 (1985); *El Cerrito v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962). The quiet title action merely confirms that title has already

passed. *Halverson*, 41 Wn. App at 460. In the case at hand, The Lundgrens are able to decisively prove that all of these requirements were fulfilled for a period of well over 10 years.

***A.1 Open and Notorious: The Lundgrens maintained a permanent, visible fence that separated the two parcels and they maintained the property on their side of the fence open and notoriously by harvesting timber and clearing dead branches and brush.***

“The open and notorious element of adverse possession requires proof that (1) the true owner has actual notice of the adverse use throughout the statutory period, *or* (2) the claimant (and/or predecessors) uses the land in a way that any reasonable person would assume that person to be the owner.” *Shelton*, 106 Wn. App. 51–52. “In determining what acts are sufficiently open and notorious to manifest to others a claim to land, the character of the land must be considered. The necessary use and occupancy need only be of the character that a true owner would assert in view of its nature and location.” *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984) (quoting *Krona v. Brett*, 72 Wn.2d 535, 539, 433 P.2d 858 (1967) (internal quotation marks omitted)).

The Lundgrens exercised open and notorious use of the property given its nature and location in a wooded area. (CP 28–30, 45–46, 60–61, 110–11.) They consistently and continuously maintained the fence so that it remained in good condition. (*Id.*) They maintained the property on their side of the fence so that it remained clear of fallen or dead trees, limbs and brush. (*Id.*) And they even selectively removed timber while preserving the majority of standing trees. (*Id.*) From these acts, a reasonable person

would conclude that the Lundgrens are the disputed property's true owners.

David Brown's lack of knowledge regarding the property he inherited and owned for four months is immaterial because the Lundgrens' use of the land, in view of its nature and location, was sufficiently open and notorious to establish adverse possession. "Open" and "notorious" mean that activities or objects on the land are visible and discoverable, *if not actually known*, to the true owner. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE SERIES, REAL ESTATE: PROPERTY LAW § 8.11 (2d ed. 2004). "[T]he owner is charged with constructive notice of permanent, visible objects placed on the ground, even if they are only slightly upon the land and would be seen to intrude only by scrupulous inspection or even by professional survey." *Id.* Actual notice or knowledge is not necessary if the acts of possession are consistent with actions a true owner would take. *Doyle v. Hicks*, 78 Wn. App. 538, 542–43, 897 P.2d 420 (1995).

In the case at hand, a permanent, visible, 1,306-foot-long fence marked the boundary between the two properties for many decades. (CP 29, 36, 45–46, 60–61, 110–11.) This boundary has long been respected by members of both the Brown and Lundgren families. (CP 30, 45–46, 60–61, 110–11.) Ms. Brown only cut timber on her side of the fence, never cutting trees on the Lundgrens' side of the fence. (CP 30.) Ms. Brown's brother-in-law, Ray Brown, further confirmed that both families were aware of the boundary fence that was put in place in the

1940s, and both have respected it as the property line. (CP 110.) Ray Brown himself observed the fence in the 1960s and 1980s and, in logging on Ms. Brown's property, treated the fence as the property line. (CP 110–11.) All those who visited the disputed property, such as Ray Brown, were immediately and effectively put on notice of the property line.

“Adverse possession is ultimately a doctrine of repose, whose purpose is to make legal boundaries conform to boundaries that are long maintained on the ground, even if it means depriving an owner of title.” 17 WILLIAM B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE SERIES, REAL ESTATE: PROPERTY LAW § 8.11 (2d ed. 2004). Such is the case here, where a well-maintained fence has existed since 1947 and the property owners on both sides of the fence respected the fence as the property line. (CP 28–30, 45–46, 60–61, 110–11.) Regardless of one minority owner's lack of familiarity with his own property, the open and notorious nature of the fence and the Lundgren's use of the disputed property would lead any reasonable person to assume the Lundgrens are the true owner. The Tribe did not dispute that the Brown family never maintained the fence, and the Tribe never contested the Lundgrens' or their predecessors' exclusive possession of the disputed property. There is simply no evidence that the Lundgrens did not use the disputed property openly and notoriously.

*A.2 Actual and Uninterrupted: the Tribe did not rebut the Lundgrens' evidence showing that their use of the disputed property was actual and uninterrupted.*

The Lundgrens' claim to the disputed property is not a theoretical claim. The Lundgrens have actively used the area in dispute since they bought their property in 1981. (CP 29–30, 45–46, 60–61, 110–11.) The Lundgrens' predecessors in title actively used and occupied the disputed property since 1947. (CP 29–30, 45–46, 60–61.) The Lundgrens' actual use has been far from sporadic considering the continual maintenance of the grounds and fence by culling dead trees, harvesting timber, and repairing all damage to the fence each and every year they have owned the property. (CP 29–31, 45–46, 60–61, 110–11.) No one else had entered, maintained or otherwise altered the disputed property with or without the Lundgrens' invitation or permission. (CP 30–31.) No other party, either the Tribe or its predecessor-in-interest, ever made use of this property. (CP 29–31, 45–46, 60–61, 110–11.) There can be no dispute that the Lundgrens' use of the disputed property was actual and uninterrupted.

In response, the Tribe admits that it has no evidence to rebut the Lundgrens' testimony that their use of the land was actual and uninterrupted. "The Tribe has no facts to rebut the testimony that the Lundgrens and their predecessors have gone onto the disputed property, cut trees, trimmed branches, and perhaps mended the fence in the last 70+ years." (Appellant's Opening Brief p. 37.) Instead, the Tribe argues that the Lundgrens' use was sporadic. (*Id.*) However, as addressed above, the Lundgrens' use of the property was far from sporadic.

***A.3. Exclusive: The Lundgrens' use of the property was exclusive and there is no evidence that anyone but the Lundgrens used the disputed property.***

“In order to be exclusive for purpose of adverse possession, the claimant’s possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an owner under the circumstances. Important to a consideration of what use an owner would make are the nature and location of the land.” *Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987) (internal citations omitted). “Cases where the courts have found a lack of exclusivity involve use by the title owner that indicates ownership.” *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 217, 936 P.2d 1163 (1997).

The Lundgrens purchased the property in 1981 from family members, and immediately upon purchase took exclusive possession of the property within the existing fence line. (CP 29–30.) During their ownership, the disputed property was always located within the permanent and unchanging fence line and utilized solely by the Lundgrens. (CP 29–31, 45–46, 60–61, 110–11.) Since the Lundgrens purchased the property in 1981, no one has entered, maintained or otherwise used the disputed property without the Lundgrens’ permission. (CP 29–31.) Indeed, the fence prevented any such inconsistent use. (*Id.*) The property was used in such a way that there would be no doubt which party exclusively exerted control over it. There is no dispute that the Lundgrens exercised exclusive use and control of the disputed property for a period exceeding 10 years.

The Tribe provided no testimony that their predecessors in interest, the Browns, used the disputed property at all — let alone in a way that indicates ownership. In fact, during the time the Lundgrens and their extended family owned the property, from 1947 to present, no one owning property to the north of the fence has even attempted to enter the disputed property. (CP 30–31.)

Instead, the Tribe points to the existence of a gate and argues that exclusivity can be defeated by allowing access from the north side of the property. (Appellant’s Opening Brief pp. 36–37.) However, the Tribe did not provide any evidence of the gate being used by either party in a manner indicating ownership or lack of exclusivity. This does not create an issue of fact because the Lundgrens do not dispute the gate’s existence. The existence of a gate is immaterial absent evidence that someone besides the Lundgrens actually used the gate. The Tribe is merely speculating as to the reason the gate exists and its use over the decades. Mere speculation is insufficient to defeat summary judgment.

The Tribe cites *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128 (1980) for support that the existence of a gate defeats summary judgment. In *Peeples*, a quiet title action, the respondent Port of Bellingham failed to prove exclusivity because “[t]he port did not restrict access from the easterly (railroad) side by building a fence or other barrier. Moreover, no evidence was presented that the port limited access . . . to the property . . .” *Id.* at 773. By contrast, the properties here were separated by a fence that served as the boundary line and restricted access

to the properties. (CP 29–31, 45–46, 60–61, 110–11.) Annabell Brown only cut timber on her side of the fence, and nobody entered the disputed property from the Browns’ land to the north. (*Id.*) Meanwhile, the Lundgrens cut timber on their side of the fence, and they maintained the land by culling dead trees, limbs and brush. (*Id.*) There is only one reasonable conclusion from these facts: the Lundgrens exclusively used the land on their side of the fence.

***A.4. Hostility: The Lundgrens’ use of the property was hostile because the Lundgrens and their extended family have used this property as true owners for several decades, maintaining both the fence and the land.***

Possession is hostile if the adverse possessor treats the property like a true owner would throughout the ten-year statutory period. *Chaplin*, 100 Wn.2d at 860–61. Whether use is hostile depends on the nature, character, and location of the property. *Frolund v. Frankland*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), overruled on other grounds by *Chaplin*, 100 Wn.2d at 861 n. 2. In this case, the Lundgrens used the property as a true owner would use it. They tended and harvested timber and maintained the fencing. (CP 30–31, 45–46, 60–61, 110–11.) The fence they maintained on the disputed property was in existence when they purchased the property in 1981. (CP 29–31, 45–46, 60–61, 110–11.) At no time did the Lundgrens or their predecessors-in-interest ever seek permission from the Tribe or its predecessors-in-interest to use the disputed property. (CP 31.) There can be no question that the Lundgrens have fulfilled the

hostility requirement as they had used the disputed property as a true owner would for a period exceeding ten years.

The Tribe again fails to cite any factual evidence besides the existence of a gate. Instead, the Tribe cites *Gamboa v. Clark*, 183 Wn.2d 38, 348 P.3d 1214 (2015) and argues for extending the legal presumption of permissive use from prescriptive easement cases to adverse possession cases. *Gamboa* is not on point. *Gamboa* addressed an initial presumption of permissive use but only in the context of a prescriptive easement — not adverse possession. 183 Wn.2d at 43. The principles and legal theory involved in adverse possession cases are distinctly different from those where a landowner acquiesced to the use of a path, or road, across his uncultivated land. A prescriptive easement is by its nature a sharing of the same property by two parties. Because of that sharing, unlike adverse possession, the policy of the law is to protect the title owners from claims where the owners behaved in a neighborly way. Exclusivity is a bedrock principle of adverse possession and is completely inconsistent with the doctrine of prescriptive easement. Therefore, a presumption of permissive use is entirely at odds with a claim of adverse possession. This may require explicit evidence that the true owner was put on notice that the user claimed something more than a permissive right to be on the land. Neither the court in *Gamboa*, nor any other Washington precedent, applied a presumption of permissive use to adverse possession or mutual recognition claims.

Furthermore, the Court held that such a presumption only arises where there is “a reasonable inference of neighborly sufferance or acquiescence.” 183 Wn.2d at 47–50. Illustrative cases include those where, for example, a path between properties was created by simultaneous neighborly usage over 30 years. *Id.* at 47. Here, there is no simultaneous neighborly usage — only exclusive usage by the Lundgrens. The only evidence of “neighborly acquiescence” is mere friendliness, but Washington courts do not require actual animosity between neighboring property owners to find the element of hostility. In *El Cerrito*, 60 Wn.2d at 854, the record title owners unsuccessfully argued, just as the Tribe does here, that hostility was not present because the record indicated “that the parties occupying the adjoining property were friendly and neighborly and, furthermore, that the [adverse possessors] at one time had offered to buy the disputed strip of land . . .” The court found the adverse possessor’s interest to be hostile nonetheless.

Permissive use is not a “reasonable inference” from mere friendliness alone, especially where the undisputed facts show that the Lundgrens and their extended family have exclusively possessed and exercised dominion over the property since 1947. (CP 29–30; 60–61.) They have cut timber on their side of the fence, maintained the fence, and culled dead trees, limbs and brush. (CP 29–31, 45–46, 60–61, 110–11.) At no time did the Browns ever enter or express ownership in the disputed property. The Lundgrens alone have treated this property as a true owner would, and summary judgment on their adverse possession claim was

therefore warranted. Indeed, a presumption of permissive use is completely at odds with the adverse possession elements of exclusivity, actual and uninterrupted, open and notorious, and hostility.

***A.5. The Lundgrens' use of the property as above described took place for more than ten years.***

It is incontrovertible that the Lundgrens have used the disputed property for well over ten years as required under RCW 4.16.020. As seen in the Declaration of Sharline Lundgren, the fence separating the two properties was in existence when the Lundgrens purchased the property in 1981. (CP 29–30.) The same testimony is given by Ray Brown, the brother-in-law of previous owner Annabell Brown, who visited the property in the 1960s while helping his brother cut wood on the property, and again in the 1980s when logging on the property. (CP 110–11.) There can be no dispute that the Lundgrens' use of this property has taken place for more than ten years.

**B. The Lundgrens' title by adverse possession was automatic and ripened long before the tribe acquired bare legal title.**

When a person adversely possesses real property for ten years, such possession ripens into an original title. *El Cerrito*, 60 Wn.2d at 855. Divestment of title does not occur differently or more easily to the person who acquires title passively by adverse possession than to the person who acquires title by deed. *Id.* Once a person acquires title by adverse possession, he cannot be divested of title to the property by “parol abandonment,” relinquishment, verbal declarations, or any other act short of what would be required had he acquired his title by deed. *Mugaas v.*

*Smith*, 33 Wn.2d 429, 431, 206 P.2d 332 (1949). A person who acquires title by adverse possession can convey it to another party without having had title quieted in him prior to the conveyance. *El Cerrito*, 60 Wn.2d at 855. In addition, the 10-year statute of limitations does not require the owner by adverse possession to have held the property continuously in an adverse manner up to the time he seeks to quiet title. *Id.* Instead, he may bring his action at any time after his 10-year adverse possession period. *Id.* These authorities make it clear that the Lundgrens acquired the disputed property at the latest in 1981, and could not be divested of the property except through the types of conveyance necessary if they had held title by deed.

**C. Summary judgment was appropriate on the Lundgrens' claims of mutual recognition and acquiescence.**

When boundary disputes arise, there are several legal doctrines that may result in the true, legal boundary being different than what is shown in a deed or survey. Adverse possession is the most commonly encountered of those theories. A related doctrine known as mutual recognition and acquiescence (sometimes referred to as "mutual recognition and acceptance") is based on a history of the owners of adjacent parcels having recognized some objective physical element(s) on the ground and having accepted that as the true boundary for a ten-year period. The elements of this claim are summarized in *Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997) (quoting *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967):

(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

In *Lilly* the court reversed a summary judgment in favor of the title owner (Lynch), and held that the alleged encroacher (Lilly) had submitted sufficient evidence from which a jury could find that the doctrine applied. *Id.* at 316–18. The evidence showed that a wall had existed along the supposed line for more than 10 years, that the parties on each side maintained the grounds up to the wall, and that neither Lynch nor his predecessors had ever acted in any way that would suggest they had thought they owned property past that wall. *Id.* at 317–18.

These cases are inherently fact-specific, and it is difficult to find reported cases on all fours. One similar and oft-cited Washington case is *Lamm*, 72 Wn.2d 587, where the court summarized the history of the doctrine in Washington and affirmed the trial court’s decision. The plaintiff and the defendant had disagreed on their mutual boundary. *Id.* at 588. The plaintiff relied on a fence that had been in place for many years, and which actually encroached on the defendant’s “deeded” property as determined by a later survey. *Id.* at 589–90. The fence was originally two strands of barbed wire running between wood posts, and later was

replaced by a wire mesh fence in the same location. *Id.* The fence line existed for 25 years and the parties and their predecessors each maintained and used the land up to the fence as though it were the boundary. *Id.* Under those facts, the court had no trouble holding that the doctrine applied. *Id.* at 591.

Applying the three-part analysis here, there is only one possible conclusion: the true boundary between the Lundgrens' and the Tribe's properties is the barbed wire fence that has existed for many decades. First, the line was clearly marked by the fence running in a straight line; i.e., there was a set of distinct physical features on the ground. Second, the conduct of the Lundgrens and the Tribe's predecessors before them was unmistakable: the fence line was respected and acknowledged as the boundary of the property. There is no evidence or inference to the contrary. Third, the parties' conduct recognizing the line of occupation continued for well more than ten years. As such, summary judgment on the Lundgrens' claim of mutual recognition and acquiescence was appropriate.

**D. Sovereign immunity does not bar this quiet title action because the Lundgrens adversely possessed the disputed property before the Tribe acquired record title.**

The Tribe argues that "it is well established" that there can be no adverse possession against a sovereign. (Appellant's Opening Brief p. 21.) However, title by adverse possession can be acquired against a sovereign where the property was adversely possessed *before* the sovereign acquired

title. *Gorman*, 175 Wn.2d at 70. In *Gorman*, the defendant city of Woodinville acquired title to certain real property in 2005. *Id.* at 71. Two years later, the plaintiff filed an action to quiet title claiming he acquired the real property through a 10-year period of adverse possession that transpired while the land was still in private hands. *Id.* The defendant city moved to dismiss pursuant to RCW 4.16.160, which in effect bars adverse possession claims against the state. *Id.* After the trial court granted the defendant city's motion, the Court of Appeals overturned the decision and the Supreme Court affirmed. "If a claimant satisfies the requirements of adverse possession while land is privately owned, the adverse possessor is automatically vested with title to the subject property. The prior owner cannot extinguish this title by transferring record title to the state." *Id.* at 74–75.

According to the Tribe's contention, anyone who lost his or her interest in property to an adverse possessor could extinguish the adverse possessor's vested title by transferring record title to an Indian tribe. In other words, the Tribe automatically wins despite never acquiring actual title. This Court directly refuted this "absurd" consequence in *Gorman*.<sup>3</sup> As described more fully in Section E below, Division One of the Washington Court of Appeals directly rejected this contention, ruling that

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<sup>3</sup> Under the City's interpretation of RCW 4.16.160, anyone who lost his or her interest in property to an adverse possessor could extinguish the adverse possessor's vested title by transferring record title to the government. We presume the legislature did not intend such absurd consequences. *Id.* at 74.

the Stillaguamish Tribe could not use sovereign immunity to defeat title that ripened by adverse possession prior to the conveyance to the tribe.

The Tribe's arguments, and all related implications, have been fully litigated and resolved by Washington courts. The Lundgrens fulfilled the requirements of adverse possession long before the Tribe attempted to take an ownership interest in the disputed property. By the time the Tribe acquired record title, the Lundgrens' possession had ripened into original title, which cannot then be divested from them by any act other than that required where title was acquired by deed. Because the Tribe's predecessor-in-interest did not have ownership of the disputed property, they could not have conveyed an interest in it. For the same reasons, the time at which the quiet title action was instituted is not relevant to the analysis and does not distinguish this case. The Tribe's sovereign immunity does not deprive the court of jurisdiction over land the Tribe never owned. Otherwise, a tribe's claim to property anywhere in the state, regardless of the merits, would render the courts helpless to adjudicate and safeguard established real property rights.

The application of sovereign immunity to this adverse possession case would not only upend *Gorman*, it would also effectively overrule the automatic title doctrine articulated in *El Cerrito*.

**E. The trial court appropriately denied the Tribe's Motion to Dismiss because the court possessed jurisdiction over this quiet title action "in rem."**

The Tribe contends that CR 12 prevents this action from continuing because the Court lacks jurisdiction over the Tribe. Under settled Washington law, this Court does not lack subject matter jurisdiction due to sovereign immunity because this is an *in rem* action, and the Lundgrens are not seeking a monetary judgment. Subject matter jurisdiction is a court's authority to adjudicate the type of controversy involved in the action. *Shoop v. Kittitas County*, 108 Wn. App. 388, 393, 30 P.3d 529 (2001). It is clear that the superior courts of Washington have subject matter jurisdiction over issues concerning title to real property. RCW 4.12.010.

The Tribe refuses to recognize Washington case law holding that jurisdiction in quiet title actions exists over the property "in rem" regardless of immunity claimed by an Indian tribe or a municipality. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 929 P.2d 379 (1996) directly shows that superior courts have jurisdiction over an Indian tribe in an *in rem* action. In *Anderson*, a lumber company brought an action to partition and quiet title to lands within the Quinault Indian Reservation. *Id.* at 864. As with the case at bar where the original owners (who were not tribal members) sold their interest in the property to the Tribe, the original defendants in *Anderson* sold their interest to the Quinault Indian Nation. This Court ruled that the trial court had *in rem* jurisdiction and the subsequent sale of interest in the property

to an entity enjoying sovereign immunity did not affect the court's jurisdiction. *Id.* at 865, 873. Since the superior court's assertion of jurisdiction was not over the entity *in personam*, but over the property *in rem*, no waiver of sovereign immunity was necessary. *Id.* at 873.

As stated in *Phillips v. Tompson*, 73 Wn. 78, 82, 131 P. 461 (1913), quiet title actions are *in rem*. Therefore, under *Anderson*, sovereign immunity does not affect the court's jurisdiction over the present case.

The exercise of *in rem* jurisdiction will not deprive the Tribe of any property since, as held in *El Cerrito*, 60 Wn.2d at 855, the Tribe never owned the disputed property:

When real property has been held by adverse possession for ten years, such possession ripens into an original title. Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed. The person so acquiring this title can convey it to another party without having had title quieted in him prior to the conveyance. Once a person has title (which was acquired by him or his predecessor by adverse possession), the ten-year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit. He may bring his action at any time after possession has been held adversely for ten years.

In the present case, the Lundgrens fulfilled the requirements of adverse possession and mutual recognition long before the Tribe received a putative ownership interest in the disputed property. The Lundgrens' possession had already ripened into original title, which cannot be divested from them by any act other than those required where title was acquired by

deed. Because the Tribe's predecessor-in-interest did not have ownership of the disputed property, they could not have conveyed an interest in it. Therefore, the Tribe, never having legal title in the disputed property, did not lose any property.

In *Smale*, 150 Wn. App. 476, a case nearly on all fours with the case at bar, the Washington State Court of Appeals, Division 1, reviewed a decision by the Snohomish County Superior Court upholding jurisdiction in a quiet title – adverse possession case against the Stillaguamish Tribe. Division 1 recognized the *in rem* jurisdiction of the superior court in a claim for adverse possession regardless of the fact that a federally recognized tribe acquired title after the adverse possession ripened into title:

If the Smales adversely possessed the portion of the Disputed Property that originally fell within their fence line, their possession ripened into original title after 10 years of possession. And if the Smales acquired title before the suit was filed and Norette attempted to convey the land, Norette had no title to convey. Thus, the Tribe never had any property to lose . . . The Tribe argues that there can be no adverse possession claims against a sovereign. But the Smales allege that they acquired title to the land in question before Norette deeded the land to the Tribe. As such, they are not attempting to adversely possess a sovereign's land. As the Idaho Supreme Court recognized in *Lyon v. State*, parties seeking quiet title to land that they allegedly own are not asserting claims against a sovereign. Accordingly, the Smales' claims are not barred by the rule prohibiting adverse possession against a sovereign.

*Id.* at 480, 483. In the case of the Lundgren property, it was conclusively established that the owners of their parcel have occupied the land demarcated by the fence for well more than 10 years, and that title ripened in them before the Tribe obtained title in 2013. As such, the Tribe did not own the disputed property upon receipt of title from the Browns and cannot assert sovereign immunity as an affirmative defense to the Lundgrens' quiet title action.

Another line of authority supports the Court's jurisdiction over this matter despite a claim of sovereign immunity. In *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261–65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), the Court held that Washington courts have jurisdiction to authorize property taxes on the basis of alienability of the allotted lands and not on the basis of jurisdiction over their Indian owners. The Tribe argues that *Cnty. of Yakima* has “no logical nexus to the case at bar.” (Appellant's Opening Brief p. 19.) On the contrary, the Court upheld the defendant county's assertion of jurisdiction “because the jurisdiction is *in rem* rather than *in personam* . . .” *Id.* at 264–65. No practical or theoretical reason exists to treat a court's *in rem* jurisdiction over an adverse possession claim differently than a court's *in rem* jurisdiction over a property tax case affecting tribal land. Indeed, *in rem* jurisdiction fits a claim involving title to real estate more comfortably than one involving property taxes. As stated above, the issue at hand, quiet title, is purely an *in rem* action and, therefore, the court has jurisdiction.

Additionally, the ruling that Washington courts have *in rem* jurisdiction over tribe-owned lands makes *Cnty. of Yakima* apply with even more force here, where privately held property was conveyed to the Tribe.

The Tribe's attempts to distinguish the governing caselaw are not persuasive, and the Tribe fails to articulate how the minor distinctions it raises impact the Court's analysis. *Anderson* involved dividing property between tenants in common, as the Tribe contends. Notwithstanding this distinction, it remains true that under *Anderson* superior courts have jurisdiction over an Indian tribe in an *in rem* action, as the Lundgrens contend. An action for partition of real property is by its nature a matter involving title, as is an adverse possession claim.

The Tribe argues that the court in *Smale* was not presented with CR 19 and its "fatal effect." As discussed below, CR 19 does not have a fatal effect on this lawsuit, and *Smale's* analysis regarding sovereign immunity remains persuasive. The Tribe also argues that *Smale* is limited in its application because the deed in *Smale* noted the ongoing adverse possession litigation. In *Smale*, like here, the key fact was not when litigation was commenced or whether the tribe had notice. The key fact was whether the claimant adversely possessed the property *before* it was transferred to the tribe. In such cases the tribe never acquired title to the disputed property because title had vested in the claimant.

Finally, the Tribe argues that the Court has no alternative but to dismiss the Complaint because *Gorman* requires litigation of adverse

possession claims, and sovereign tribes cannot be joined as a party. Contrary to the Tribe's arguments, litigation is not required to perfect adverse possession because such possession ripens into original title automatically. *Gorman*, 175 Wn.2d at 72–74. “The new title holder need not sue to perfect his interest.” *Id.*

**F. Civil Rule 19 presents no obstacle to the Court's exercise of *in rem* jurisdiction.**

The Tribe contends that the trial court should have dismissed the Lundgrens' Complaint pursuant to CR 12(b)(7) and CR 19 because the Tribe is a necessary and indispensable party and, due to sovereign immunity, cannot be joined. (Appellant's Opening Brief pp. 24–30.) However, Civil Rule 19 clearly does not require dismissal given the above Washington case law squarely holding that a superior court can exercise jurisdiction in an *in rem* action when the action concerns land acquired by adverse possession/mutual recognition before the tribe acquired record title. Because the Court has *in rem* jurisdiction, sovereign immunity is not a bar to jurisdiction, the Tribe is not an indispensable party, and Civil Rule 19 does not prevent the case from proceeding.

In fact, *in rem* proceedings exist precisely for the type of scenario presented here, where jurisdiction “over the person” of one or more of the defendants with potential claims to the property cannot be secured. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1070, 280 (3d ed. 2002); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 453, 124 S. Ct. 1905, 158 L. Ed. 2d 764

(2004) (wherein the United States Supreme Court cited Wright and Allen's treatise with approval, and held that a bankruptcy court's discharge order binds states regardless of sovereign immunity because the bankruptcy court exercises jurisdiction over the debtor's assets *in rem*, thus permitting it to determine all claims that anyone, whether named in the action or not, has to the property in question.)

“The fact that the court cannot obtain jurisdiction over the person of all defendants or claimants to the property is considered irrelevant to whether *in rem* or quasi-*in-rem* jurisdiction is constitutionally permissible.” WRIGHT & MILLER, *supra*, at 280–81. “A proceeding in rem . . . takes no cognizance of an owner or a person with a beneficial interest, but is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants.” *Smale*, 150 Wn. App. at 478 n. 4 (quoting 1 Am. Jur. 2d Actions § 29 (2005)). “The appellants by the proceeding are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own.” *Lyon v. State*, 76 Idaho 374, 376, 283 P.2d 1105 (1955); *see also Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land, Turtle Mountain Band of Chippewa Indians, and Shea*, 2002 ND 83, 643 N.W.2d 685, 694 (2002) (“The land at issue in this case is essentially private land which has been purchased in fee by an Indian tribe. . . . Under these circumstances, the State may exercise territorial jurisdiction over the land, including an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated.”)

Thus, the court can exercise *in rem* jurisdiction over the disputed property regardless of the Tribe's sovereign immunity, and Civil Rule 19's indispensable party provision has no application. Were the rule otherwise, all tribes could take the expedient position that they cannot be affected by litigation concerning title to real property, and thus automatically win title to the property in dispute.

**G. The parties' negotiation regarding the disputed property is inadmissible evidence and irrelevant to the Lundgrens' claims.**

The Lundgrens object to the Tribe's introduction of negotiations between the parties regarding the disputed property. An offer made in an attempt to compromise a claim that is disputed as to validity or amount is not admissible to prove liability for or invalidity of the claim. ER 408. Evidence of conduct or statements made in compromise negotiations is similarly not admissible pursuant to ER 408. A lawsuit does not have to be filed for ER 408 to apply. *Duckworth v. Langland*, 95 Wn. App. 1, 5-6, 988 P.2d 967 (1998). For example, a pre-lawsuit letter was excluded under ER 408 where a dispute had arisen between the parties. *Id.* The Lundgrens object to the all references in the record to statements made while attempting to settle this dispute in anticipation of possible litigation. Moreover, the Lundgrens reject any suggestion that they offered to buy the disputed property.

In any event, any subjective beliefs implied by the Tribe's characterization of the Lundgrens' willingness to negotiate are irrelevant. In *El Cerrito*, the adverse possessor at one time offered to buy the disputed

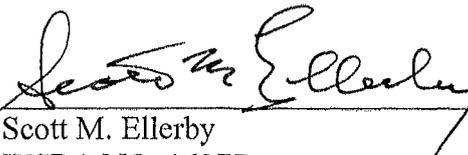
property, but the Court found that such an offer did not destroy hostility. 60 Wn.2d at 854. “[T]he possessor’s subjective belief whether the land possessed is or is not his own and his intent to dispossess or not dispossess another are irrelevant to a finding of hostility.” *Chaplin*, 100 Wn.2d at 855; *Shelton*, 106 Wn. App. at 51. Because the Lundgrens satisfied the elements of adverse possession decades ago, their possession ripened into original title long before any alleged offer to buy or trade with the Tribe. Even if ER 408 did not prohibit the consideration of this evidence, any inferences therefrom would only bear on the Lundgrens’ subjective beliefs subsequent to developing original title. Washington law is clear that such beliefs have no bearing on the validity of their title.

## V. CONCLUSION

The Tribe’s effort to avoid appeal to Division I and the application of its *Smale* decision should not be furthered by granting its petition. The holding in *Smale* was consistent with the exercise of *in rem* jurisdiction and upheld the expectations of landowners who possessed the disputed property for generations. Washington courts must, and do, have *in rem* jurisdiction to protect property interests established long before attempted conveyance to a sovereign entity.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of November 2015.

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By: 

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CERTIFICATE OF FILING AND SERVICE

I, Anna Armitage, hereby certify that I filed the foregoing with the Supreme Court, State of Washington, and served same upon the following counsel of record:

Via Electronic (Email) Service and U.S. Postal:

Attorneys for Petitioner (Defendant):

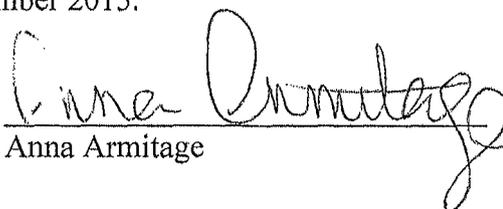
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DATED this 2<sup>nd</sup> day of November 2015.

  
Anna Armitage

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Dear Clerk,

Please find attached Respondents' brief regarding the above referenced matter.

Thank you,  
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